No. 80-950

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE C. NICOLADZE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor made improper statements which prejudiced the grand jury that returned petitioner's indictment.

2. Whether the government's use of charts and summaries during the testimony of its expert witness was proper in this prosecution for attempted tax evasion.

3. Whether the trial court correctly ruled that the prosecutor's attempted impeachment of two character witnesses did not warrant a mistrial.

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OPINIONS BELOW

The district court did not issue a written opinion. The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. The petition for a writ of certiorari was filed on November 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on three counts of attempted income tax evasion, in violation of 26 U.S.C. 7201 (Tr. 2140).[1] The district court sentenced him to three years' imprisonment, suspending all but six months on the condition that he serve five years' probation. The court further imposed court costs as part of the sentence imposed on Count One, and fined petitioner $1,000 on each count (Tr. 2205-2206). The court of appeals affirmed (Pet. App. 1a-2a).

The evidence adduced at trial showed that petitioner, a law school graduate, was engaged in the business of providing tax and financial planning services (Tr. 91-92, 1574-1575). He operated his business as a sole proprietorship until early 1973, when he began operating through a closely-held corporation to which he made a general assignment of all his income (Tr. 923-925). During the audit that led to the prosecution in this case, petitioner explained to revenue agents that he computed his income for tax purposes by depositing all of his income into his checking account, and

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[1] "Tr." refers to the trial transcript. "G. Exh." refers to the government exhibits introduced at the trial.

using his bank records to determine gross income by subtracting all non-income deposits made to the account (Tr. 41-42, 71). Examination of his bank records, however, disclosed a substantial discrepancy between petitioner's deposits and reported gross income, which he attempted to explain as non-income items, including loans and advance payments received from clients on a contingency basis for future services (Tr. 43-45, 74-81). Several clients, interviewed by the agents, contradicted petitioner's characterization of the payments and indicated they were for current services. In addition, the agents' investigation disclosed a substantial number of income checks which had been cashed by petitioner and were neither reflected in his bank deposits nor included on income lists provided by petitioner in the course of the investigation (Tr. 94-95, 926-944). This information was presented to the grand jury that returned petitioner's indictment.[2]

At trial, the evidence established that petitioner willfully failed to report income payments received from clients and other income on his individual income tax returns for 1972 and 1973 and on the return of his corporation for its taxable year ended January 31, 1975 (Tr. 1216-1256). The government employed the "specific items" method of proof, introducing direct evidence of checks and other non-cash payments received but not reported, to establish that petitioner had understated his individual and corporate taxable income for the three years by $30,467.38, which resulted in an underpayment of income tax liabilities of $5,583 (Tr. 1216-1254).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that in presenting the case to the grand jury, the prosecutor made improper comments that rendered the indictment invalid. Specifically,

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[2]Transcript of the grand jury proceedings, at 6-15.

petitioner points to a remark by the prosecutor, near the close of the presentation of the government's evidence to the grand jury, made in response to an inquiry by a grand juror concerning whether the six-year processing time of this tax evasion case was typical. The prosecutor explained the review process for tax crime investigations, through IRS counsel and attorneys at the Department of Justice, to account for the time consumed before such a case comes to the United States Attorney. In this context, the prosecutor remarked that such a case goes through several stages of review to determine whether it meets the "standards for prosecution * * * whether there's evidence or proof beyond a reasonable doubt, that the individual is guilty."[3] No further discussion of the matter occurred; the prosecutor's explanation was followed by two unrelated questions by the grand jurors to the government's witness before the grand jury adjourned.

Petitioner suggests that these remarks alone amounted to prosecutorial misconduct that interfered with the grand jury's independent deliberative function. Petitioner implies, but does not actually assert, that the grand jury was prejudiced by these comments. However, only the most strained interpretation of the prosecutor's response to the grand juror's procedural inquiry could even remotely support the inference that her comments inadvertently biased the grand jury.

"[I]t takes very substantial evidence of grand jury bias for an appellate court to reverse a conviction because of an indictment returned by an allegedly biased grand jury." *United States* v. *Polizzi*, 500 F. 2d 856, 888 n.55 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975). "[T]he federal courts have clearly established the principle 'that the dismissal of an indictment on the basis of governmental misconduct is an extreme sanction which should be infrequently

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[3]Transcript of the grand jury proceedings, at 17-18.

utilized.' " *United States* v. *Birdman*, 602 F. 2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), quoting *United States* v. *Owen*, 580 F. 2d 365, 367 (9th Cir. 1978). In numerous cases treating allegations of prosecutorial misconduct far more substantial than that alleged here, the courts of appeals have refused to dismiss the indictment. See, *e.g.*, *United States* v. *Bruzgo*, 373 F. 2d 383 (3d Cir. 1967); *United States* v. *Birdman, supra.*

United States v. *Samango*, 607 F. 2d 877 (9th Cir. 1979), upon which petitioner relies (Pet. 10-11), is not to the contrary. There, the court sustained the dismissal of an indictment because of the cumulative effect of numerous errors and indiscretions by a prosecutor, none of which alone might have been sufficient, but which taken together exceeded the limits of acceptability and operated to prejudice the grand jury. Here, on the other hand, the prosecutor did not engage in the kind of repeated, egregious misconduct that might so prejudice a grand jury as to warrant reversal of an otherwise valid conviction rendered after a fair trial. Petitioner does not, and indeed could not, suggest that the prosecutor did anything calculated to discourage a thorough evaluation by the grand jury of the evidence, or that her innocent remarks had such an effect. While the prosecutor could have answered the grand juror's question in a less self-serving manner, petitioner has not demonstrated that this single remark raised a "reasonable inference of bias on the part of the grand jury." *United States* v. *Polizzi, supra*, 500 F. 2d at 887-888.

2. Petitioner also contends (Pet. 13-14) that the government improperly used charts and summaries in its examination of its expert witness. But the courts have uniformly upheld this method of proceeding. See, *e.g.*, *United States* v. *Skalicky*, 615 F. 2d 1117 (5th Cir. 1980), cert. denied, (No. 79-1866) (Oct. 6, 1980); *United States* v. *Gardner*, 611 F. 2d 770 (9th Cir. 1980); *United States* v. *Collins*, 596 F. 2d

166 (6th Cir. 1979); *United States* v. *John Bernard Industries, Inc.*, 589 F. 2d 1353 (8th Cir. 1979); *United States* v. *Prevatt*, 526 F. 2d 400 (5th Cir. 1976). See also Fed. R. Evid. 1006.

Prior to using the charts and summaries, the government had introduced the direct evidence of petitioner's unreported income and resultant tax liabilities upon which the charts and summaries were based, including checks and other records of payments as well as testimony by several of petitioner's clients and business associates. The expert extensively related the evidence already in the record upon which he based the conclusions reflected in the charts and summaries (Tr. 1216-1256). The court repeatedly instructed the jury as to the status and use of the charts and summaries (Tr. 1342, 2090-2091), warning the jury that they were not evidence in the case, but merely permitted to be used as a matter of convenience and to be disregarded entirely by the jury if they did not correctly reflect the facts and figures shown by the evidence in the case. Moreover, the jury was clearly advised that certain headings on these charts and summaries were only characterizations of the expert's opinion and not conclusive evidence (Tr. 1225, 1227, 1231, 1237, 2090-2091). On these facts, it is clear that petitioner was not prejudiced by the use of the charts and summaries.[4]

3. Finally, petitioner contends (Pet. 14-16) that the prosecutor's attempted impeachment of two character witnesses was improper and warranted a mistrial. The witnesses involved were two of petitioner's clients, initially called by the government to establish specific items of income (Tr. 845-877). Petitioner's counsel made them petitioner's own witnesses by asking each of them about petitioner's reputation in the community for veracity (Tr. 856, 874). During

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[4]Indeed, petitioner's own expert made similar use of such visual aids (Tr. 1855-1913).

questioning, both witnesses expressed their personal opinion as to petitioner's character, and the prosecutor asked them both whether their favorable opinions would be changed by knowledge that petitioner had lied under oath (Tr. 856-857, 873-876).

Petitioner claims that the prosecutor did not have a good faith basis for this questioning. The prosecutor's reference was to statements made by petitioner under oath in a deposition in a civil lawsuit. The deposition (G. Exh. 60) had been introduced (Tr. 775) into evidence by the government in this case in connection with two $2,000 checks (G. Exhs. 48A, 49A; Tr. 807, 822) received by petitioner from H. Roger Lawler. The agent who discovered the checks during his audit testified that petitioner had explained that the checks represented loans from Lawler used to capitalize two corporations for Lawler (Tr. 80-82). Lawler also testified that the checks represented loans for such purpose (Tr. 807-820). The government sought to cast doubt upon the credibility of petitioner's and Lawler's characterization of the checks in order to show that a portion of each check constituted income to petitioner. To that end, the prosecutor read to the jury (Tr. 769, 775) pertinent parts of a deposition (G. Exh. 60) taken from petitioner after his discussion of the checks with the revenue agent, in which petitioner had stated under oath that he had used his own funds to capitalize the corporations and specifically denied receiving any funds from Lawler for that purpose (G. Exh. 60, at 58-59, 87-88). Thus, at the time of the prosecutor's questions, the jurors had already been presented with evidence demonstrating that petitioner's deposition testimony was false, contradicted by evidence of petitioner's own acknowledgments to revenue agents, Lawler's testimony confirming the payments, and the checks themselves. Thus, the prosecutor's questions were entirely proper.

Petitioner's assertion (Pet. 16) that the prosecutor was required to possess a good faith belief that petitioner had committed all the elements of the crime of perjury is clearly erroneous (although it appears that the government indeed had demonstrated perjury). Rule 608(b) of the Federal Rules of Evidence permitted the prosecutor to ask questions of character witnesses concerning "specific instances of conduct" relevant to petitioner's veracity. It is irrelevant whether such conduct constitutes a crime. See *United States* v. *Cole*, 617 F. 2d 151, 153-154 (5th Cir. 1980); *United States* v. *Bright*, 588 F. 2d 504, 511-512 (5th Cir. 1979); *United States* v. *Crippen*, 570 F. 2d 535, 538-539 (5th Cir. 1978). There was ample evidence before the court and the jury to establish a reasonable basis for the prosecutor's question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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